Whether on principle the distinction is to be considered sound depends largely upon the views that are held as to the desirability of the *cy-près* exception. Those who look upon it as a means of carrying into effect the obvious intent of a testator, and, as such, a rule worthy of the fullest application, cannot but regard this distinction as arbitrary and unjust. On the other hand, the holders of the opposite view suggest that to apply the *cy-près* rule where the fund has once vested in a charity is only to leave the property in the hands of the present holder, whereas, where the object fails in the testator's lifetime, to apply this doctrine is to deprive the heir of property which has naturally fallen to him. But when it is remembered that the only object of the rule is to do justice to the testator's expressed wishes, it would seem that the distinction is hardly valid.

The principal case may, however, be supported even under the stricter rule. The interest which the college had at the testator's death was a contingent remainder, and, although contingent, the remainder was a vested property right. So it is possible to say that the fund had become vested in charity before the institution ceased to exist.

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DAMAGES IN AN ACTION FOR DECEIT. — Until recently the authorities in this country were practically unanimous in holding that the damages in an action on the case for a fraudulent misrepresentation were the same as in an action for a breach of warranty. *Morse* v. *Hutchins*, 102 Mass. 439; *Page* v. *Parker*, 43 N. H. 363. However, in 1889 the Supreme Court of the United States, with hardly any discussion of the authorities, held that the measure of damages was, not what the plaintiff might have gained had the representation proved true, but what he had lost by being deceived into the purchase. *Smith* v. *Bolles*, 135 U. S. 125. The doctrine of this decision has since been applied in a few cases. *Rockefeller* v. *Merritt*, 76 Fed. Rep. 909 (C. C. A. 8th Cir.); *Hegh* v. *Berrett*, 148 Pa. St. 263. It also prevails in England. *Peek* v. *Derry*, L. R. 37 Ch. D. 541. On the other hand, most of the state courts that have since passed upon the question have adhered to the older rule. *Gustafson* v. *Rustemayer*, 70 Conn. 125; *Fargo Gas Co.* v. *Fargo Gas & Electric Co.*, 59 N. W. Rep. 1066 (N. D.). In this state of the law a recent decision of the Supreme Court of the United States, in which the question is adequately considered, is particularly valuable. *Sigafus* v. *Porter*, 21 Sup. Ct. Rep. 34. In an action for deceit the circuit judge instructed the jury that "the measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented." The Supreme Court adopted the rule of *Smith* v. *Bolles*, *supra*, and held this to be a reversible error. Justices Brown and Peckham dissented.

Aside from the numerical weight of authority it is difficult to see any justification for the decisions *contra* to that of the principal case. In an action for a tort such damages are recoverable as are the natural and probable consequences of the tortious act. Where a party is induced to purchase property by another's fraudulent misstatements the vendor's wrongful act is not that the representations he made were false, but that he made false representations. Because of these fraudulent misrepresentations the plaintiff parts with a certain amount of money and receives in return certain property. Consequently the damages awarded should

be the amount the plaintiff is out of pocket by having this property instead of his money, together with the loss of interest and the expenses directly attributable to the defendant's fraud. Where the suit is for a breach of warranty the measure of damages must of necessity be entirely different, for then the defendant is liable on a contract, and if it is broken he must make good what the plaintiff loses by its not being fulfilled. That in the same transaction the defendant has made a fraudulent misrepresentation as well as a contract by no means necessitates the damages in the tort action being the same as those for the breach of contract. The two rights of action are entirely separate, and the rule of damages appropriate to tort actions must apply in a suit for the tort, though the very statement that constitutes a warranty may, and perhaps generally does, furnish a cause of action for deceit. The presence of these alternative remedies was probably the cause of the erroneous rule of damages that so largely prevails in this country.

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RIGHTS UNDER A THEATRE TICKET. — An interesting question as to the nature of a ticket for a reserved seat in a theatre is suggested by a recent decision, where the plaintiff, a colored man, was allowed to recover in tort for being ejected from his seat in the theatre during the performance. *Ferguson* v. *Chase*, Washington Law Reporter, Nov. 22, 1900. The court rely on the doctrine of *Drew* v. *Peer*, 93 Pa. St. 234, where there is a strong *dictum* to the effect that holders of particular seats have more than a mere license, their right being "in the nature of a lease, and entitling them, therefore, to peaceable ingress and egress, and exclusive possession of the designated seats during the performance." The weight of authority, it seems, is contrary to this view. Most of the few cases on the subject treat a ticket as a mere license. Wandell's Law of the Theatre, 221. Accordingly when the purchaser of a ticket was expelled from the grand stand of a race-track an action of assault and battery was refused on the ground that the license was revocable, and that upon its revocation the purchaser became a mere trespasser who could rightfully be removed from the premises. *Wood* v. *Leadbitter*, 13 M. & W. 838. In Massachusetts this English decision has been followed, and a theatre manager has been held justified in refusing to allow the holder of a ticket to take his seat in the theatre. *Burton* v. *Scherpf*, 1 Allen, 133; *McCrea* v. *Marsh*, 12 Gray, 211. In the latter case it is said that the right conferred by a theatre ticket is a contract implied from the sale and delivery of the ticket, which gives the holder a license to enter the theatre and watch the performance. Under this doctrine the proprietor may exclude any spectator at any time, and be answerable only on the contract for whatever legal damages his breach has caused. It may be noted that in the English and Massachusetts decisions it does not appear that the ticket called for any particular seat, as in the principal case. Of course such being the fact it would be impossible to construe the ticket as a lease. Where, however, the ticket does call for a particular seat, exclusive possession for a specified time is given, and there is a sufficient memorandum of the agreement; thus it may be argued that no essential element of a lease is lacking. The answer seems to rest in the fact that in the sale of a ticket no lease is intended. It is often expressly stated on such tickets that "the management reserve the right to revoke this license on refunding